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In The
Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

v.

Petitioner,

MIGUEL GONZALES, ORLENIS HERNANDEZ-DIAZ,
AND MARIO PEREZ,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE
IN SUPPORT OF THE RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization whose members represent persons accused of crime. Among the missions of NACDL is to ensure justice and due process for persons accused of crime. NACDL has over nine thousand members nationwide, and is affiliated with sixty-eight state and local criminal defense organizations with over twenty-eight thousand members. The NACDL is the only national bar association devoted exclusively to the concerns of criminal defense lawyers.

The question raised by this case is whether sentences for violation of 18 U.S.C. § 924(c) may run concurrently to any unexpired term of imprisonment imposed by a State for the same criminal conduct, which a defendant may be serving at the time of federal sentencing. The answer to this question will have far-reaching impact upon the administration of criminal justice in each of the fifty states and throughout the federal judicial system. For that reason, NACDL seeks to address the interests of defendants who may not be situated precisely as the respondents in this case, but who are affected by the Court's resolution of this issue.¹ NACDL believes that it can assist the Court in examining important policy questions raised by this case.

STATEMENT OF THE CASE

Respondents Miguel Gonzales, Orlenis Hernandez-Diaz, and Mario Perez were tried, convicted and sentenced in the Second Judicial District of New Mexico for activity related to a reverse sting operation conducted by the Albuquerque Police Department in Albuquerque, New Mexico during April, 1991. The Petitioner argues that this Court should endorse an approach that would improperly regulate New Mexico's

¹ *Amicus* has obtained consent to the filing of this brief from all interested parties, and letters of consent have been filed with the Clerk of the Court.

authority to fashion the appropriate sentence for these offenders and others who violate its laws.

The Honorable Woody Smith's sentence included actual imprisonment of thirteen (13) years for Mr. Gonzales, fourteen and one half (14 1/2) years for Mr. Hernandez-Diaz, and seventeen (17) years for Mr. Perez. The state court's determination of Mr. Gonzales' sentence is illustrative of that court's care in fashioning the appropriate punishment. Judge Smith sentenced Mr. Gonzales to nineteen and one half (19 1/2) years. This sentence included nine (9) years for Armed Robbery, three (3) years for Attempt to Commit a Felony to wit: Armed Robbery of Marijuana, three (3) years for Conspiracy to Commit Armed Robbery, and one and one half (1 1/2) years for Conspiracy to Commit Possession of Marijuana (eight ounces or more). Additionally, the New Mexico court enhanced the convictions for Armed Robbery, Attempt to Commit a Felony, and Conspiracy to Commit Armed Robbery, each by one (1) year pursuant to N.M. Stat. Ann. § 31-18-16 (1978).² Judge Smith, exercising his discretion, ordered all sentences to run consecutively. He suspended six and one-half (6 1/2) years of the sentence and ordered Mr. Gonzales to be placed on five (5) years supervised probation and paroled for two (2) years following his release from custody. Thus, Mr. Gonzales' actual sentence included thirteen (13) years of imprisonment followed by five (5) years supervised probation and two (2) years of parole. *Judgment, Partially Suspended Sentence and Commitment, State of New Mexico v. Miguel Gonzales*, No. CRCR 91-0770, March 24, 1992.³

² N.M. Stat. Ann. § 31-18-16 provides in relevant part:

When a separate finding of fact . . . shows that a firearm was used in the commission of a non-capital felony, the basic sentence of imprisonment prescribed for the offense . . . shall be increased by one year, and the sentence imposed . . . shall be the first year served and shall not be suspended or deferred.

³ See also, *First Amended Judgment, Partially Suspended Sentence and Commitment, State of New Mexico v. Orlenis Hernandez-Diaz*, No. CRCR 91-0772, April 23, 1992; *First Amended Judgment, Partially*

While respondents were serving their respective state sentences, they were indicted in the District Court of the United States for the same activity that had been the subject of their state court convictions. JA 31-34. A jury convicted respondents of conspiracy to possess and distribute marijuana in violation of 21 U.S.C. § 846, aiding and abetting in violation of 18 U.S.C. § 2, possession with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) and (B)(1)(D), and the use or carrying of a firearm during a drug trafficking crime, violating 18 U.S.C. § 924(c)(1). JA 138-39, 145-46, 149-50.

The respondents were sentenced by the Honorable John E. Conway, United States District Judge. JA 106-58. Again, the court's determination of Mr. Gonzales' sentence demonstrates the thoughtful approach to what ought to be the ultimate sentence imposed. The court, indicating its concern for notions

Suspended Sentence and Commitment, State of New Mexico v. Mario Perez, No. CRCR-91-0776, April 23, 1992. Although Mr. Gonzales' sentence reflects the state court's general objectives in punishing all three respondents, a pointed comparison of the three state sentences indicates that Judge Smith endeavored to bring consistency and fairness to the process. Judge Smith used his discretion to insure that each of the three respondents would serve relatively similar terms. However, he satisfied the state's interest for additional convictions arising out of the same conduct by imposing actual terms that varied incrementally according to each offender's conduct. For example, compared to Mr. Gonzales, Mr. Perez was charged and convicted of three additional crimes. Mr. Perez was charged and convicted of an additional count of Armed Robbery, False Imprisonment, and Eluding an Officer. Additionally, Mr. Perez' convictions warranted a total of five (5) years for firearm enhancements pursuant to § 31-18-16 NMSA (1978). For these convictions, Judge Smith imposed a total sentence of thirty-two (32) years and three hundred and sixty-four (364) days. Judge Smith then suspended all but seventeen (17) years. *First Amended Judgment, Partially Suspended Sentence and Commitment, State of New Mexico v. Mario Perez*, No. CRCR-91-0776, April 23, 1992; see also *First Amended Judgment, Partially Suspended Sentence and Commitment, State of New Mexico v. Orlenis Hernandez-Diaz*, No. CRCR 91-0772, April 23, 1992.

These State of New Mexico orders of conviction and sentence are attached as the Appendix to this Brief.

of sovereignty, rejected the prosecutor's request to run the substantial majority of Mr. Gonzales' federal incarceration consecutive to the state sentence. JA 112-14. Instead, Judge Conway ordered Mr. Gonzales' sixty (60) month sentence for Count I, conspiracy to possess and distribute marijuana, and sixty (60) month sentence for Count VI, possession with intent to distribute marijuana, to run "concurrently, one with the other and, pursuant to 5G1.3(b) of the sentencing guidelines, concurrently with the State of New Mexico sentence for which [Mr. Gonzales] is currently confined." JA 140. This sentence reflected a three-level guideline enhancement pursuant to § 3A1.2(b), as the court accepted the government's argument that respondents had reason to believe the undercover agents involved in the sting operation were police officers. JA 113-14. Finally, the court interpreted 18 U.S.C. § 924(c)(1) to require the sixty (60) month sentence for Mr. Gonzales' conviction on Count V run consecutively to both the federal and state sentences and imposed it accordingly. *Id.*

The Tenth Circuit Court of Appeals reversed respondents' convictions regarding Count VI, ruling that there was insufficient evidence that Mr. Gonzales ever had possession or constructive possession of the marijuana that served as the lure for the Albuquerque Police Department's reverse sting. *United States v. Gonzales*, 65 F.3d 814, 818-19 (10th Cir. 1995). Additionally, the Court of Appeals set aside the three-level § 3A1.2 enhancement, ruling that the success of the sting operation proved the government's position incredible. *Id.* at 819. Finally, the Tenth Circuit ruled that in successive state-federal prosecutions for the same conduct, guideline § 5G1.3(b) was applicable and required the § 924(c) sentence to be served concurrently with the previously imposed state sentence. *Id.*

All three respondents are currently incarcerated in the New Mexico penitentiary system serving the sentence imposed by the State of New Mexico. Concurrently, they are discharging the federal interest by serving the sentence imposed by the United States District Court for convictions for the violation of 21 U.S.C § 846 contained in Count I and the violation of 18 U.S.C § 924(c)(1).

SUMMARY OF ARGUMENT

18 U.S.C. § 924(c) does not mandate imposition of a consecutive sentence where the defendant is already subject to an unexpired term of imprisonment imposed by a State based upon the same criminal conduct. The plain meaning of the language employed by Congress, when viewed in its context within the entire scheme of federal criminal law, supports this conclusion. This result is also compelled by the legislative history of the Act and Congressional actions in light of this Court's decisions under the prior version of the Act. Moreover, the constitutional principle of dual sovereignty limits the power of Congress to require consecutive punishments for criminal conduct already punished by a State. Finally, the constitutional commands of fundamental fairness, embodied in the due process clauses, also compel the conclusion that the decision below should be affirmed.

ARGUMENT

I. SENTENCES FOR VIOLATIONS OF § 924(c) MAY NOT BE RUN CONSECUTIVELY TO ANY UNEXPIRED TERM OF IMPRISONMENT IMPOSED BY A STATE COURT BASED UPON THE SAME CONDUCT UNDERLYING THE VIOLATION OF § 924(c).

"On a pure question of statutory construction," this Court has often recognized, "the starting point is the language of the statute." *Schrieber v. Burlington Northern, Inc.*, 472 U.S. 1, 5 (1985). In disputes regarding the application of a statute, this Court first reviews the language of the statute to determine whether the text itself settles the issue. Just as this Court has stated in other cases, "the controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 2594 (1992).⁴

⁴ See also *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) ("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances.").

While the "plain language" is the starting point, statutory language cannot be viewed in a vacuum. Therefore, it is a simple rule of plain meaning statutory construction that "a word is known by the company it keeps." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). That is, all words must be considered in context, both within the body of the statute and in conjunction with existing law. This Court recently reaffirmed that it must "consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. '[T]he meaning of statutory language, plain or not, depends on context.'" *Bailey v. United States*, ___ U.S. ___, 116 S.Ct. 501, 506 (1995) (quoting *Brown v. Gardner*, 513 U.S. ___, ___, 115 S.Ct. 552, 555 (1994) (citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991))). Congress enacted the current language of § 924(c) as part of a thorough overhaul of federal criminal law. See The Comprehensive Crime Control Act of 1984, Pub.L.No. 98-473. Therefore, § 924(c) must be judged against this background and within this context.

A. The Plain Language of § 924(c), Which Prohibits the Imposition of a Concurrent Sentence, Applies only to Federal Sentences Imposed at the Same Time.

This simple fact that words do not possess independent denotative value and each word may have several meanings dependent on its context is not in dispute. Indeed, Petitioner concedes that the use of the word "any" is limited by its context. Pet. Brief at 15. For example, the Government acknowledges that the context in which the word "any" appears in the first sentence – "any crime of violence or drug trafficking crime" – is limited by the words that follow it in the same sentence: "for which he may be prosecuted in a court of the United States." *Id.* However, when it reaches the phrases "any other provision of law" and "any other term of imprisonment," in the third sentence of subsection (c) of 18 U.S.C. § 924, Petitioner argues, without addressing the context, that the word "any" has been transformed within the statute to become a word of all-encompassing and universal meaning. Contrary to

Petitioner's universal gloss, the critical phrases at issue here, "any other provision of law" and "any other term of imprisonment," apply only to that law and those terms of imprisonment relevant to the sentence imposed at that time. The context of the sentence, the subsection, and the law as a whole do not support any other reading.

The whole of the sentence in which the phrases "any other provision of law" and "any term of imprisonment" appear is:

Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

18 U.S.C. § 924(c).

The subject of this sentence is not "any other provisions of law" or "any other term of imprisonment," but rather is the federal sentencing court. It is the federal judge of the district court, sitting in judgment of federal convictions presently pending sentencing who is limited in the ability to "place on probation," "suspend the sentence of" or order a "term of imprisonment imposed" on a person convicted of the federal crime under § 924(c). The plain meaning of these words necessarily refers to the actions taken at the time of sentencing on the violation of § 924(c).

In light of this section's focus on the sentence imposed, the text of § 924(c) is best plainly read to mean that the federal court may not order the sentence for the violation of the section to run concurrently with any other possible term of imprisonment *imposed* – not in the past – but at that time. Although Petitioner would have this Court focus on the word "any," in fact it is the twice-used word "imposed" which carries the meaning of the sentence. Therefore, "any other term of imprisonment" refers to any other imposed at the time the § 924(c) sentence is imposed. It further includes those additional terms imposed at that time, even if they are terms "imposed for the crime of violence or drug trafficking crime in

which the firearm was used or carried." By its plain language, § 924(c) simply does not address sentences imposed at other times.⁵

This specific language of § 924(c) regarding sentences imposed at one time was necessary because 18 U.S.C. § 3584 (a) provides that multiple terms of imprisonment *imposed at the same time* run concurrently unless the court or the statute mandates that the terms run consecutively. Therefore, the current language of § 924(c) must be read as a plain expression that sentences imposed at the same time, regardless of the conduct underlying the offenses, must not be run concurrently with the sentence imposed under § 924(c).

18 U.S.C. § 924(c) is only one small part of the general penalty section relating to federal firearms violations. Section 924(c), therefore, cannot be read as engrafting upon federal law a rule relating to sentences for violations of law, state or federal, imposed at a time prior to imposition of the sentence under § 924(c). That is, § 924(c) is not a statement of general application to federal sentencing, and should not be read as usurping either 18 U.S.C. § 3584(a) or the Federal Sentencing Guidelines. Instead, it should be read as narrowly as possible: § 924(c) applies only to sentences imposed at the same time as the sentence for violation of that section.

⁵ Petitioner argues that the Tenth Circuit's reading would narrow the application of the statute only to "sentences imposed for the predicate offenses." Pet. Brief at 9. This is incorrect. There is nothing unusual about sentences imposed at the same time for various crimes of violence, drug trafficking crimes, violations of § 924(c), and violations of other federal criminal conduct. See *Deal v. United States*, ___ U.S. ___, 113 S. Ct. 1993 (1993) (§ 924(c) sentence may not run concurrently to any other federal sentences imposed at the same time). Therefore, the narrow reading required by the statute does not eviscerate the efficacy of § 924(c) punishment provisions.

B. The Statutory and Legislative History Demonstrate that § 924(c) Applies Only to Other Sentences Imposed at the Same Time.

The function of the courts in interpreting a statute is to give effect to the intent of Congress. *United States v. American Trucking Assn.*, 310 U.S. 534, 542 (1940). Where the plain language of a statute does not conclusively resolve all interpretation disputes, this Court has routinely turned to statutory and legislative history as the principal sources for determining the intent of Congress. See, e.g., *Baum v. Stenson*, 465 U.S. 886, 896 (1984) ("where, as here, resolution of a question of federal law turns on a statute and intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear"). The history of a statute allows this Court to accurately interpret the language of Congress in light of its evident legislative purpose. See, e.g., *United States v. Bornstein*, 423 U.S. 303 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). Even in instances where the plain language appears to resolve the question of its interpretation, the statutory and legislative history of any law may be used to confirm the presumption that Congress expressed its intent through the language it chose. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Congress enacted the original version of 18 U.S.C. § 924(c) as part of the Gun Control Act of 1968 to deter violent crime by imposing mandatory minimum sentences on people who use a firearm during a federal crime of violence. Pub.L.No. 90-615, 82 Stat. 1214; Pub.L.No. 90-618, 82 Stat. 1227-1235 (codified as amended at 18 U.S.C. §§ 921-928 and scattered sections of 26 U.S.C.)⁶ (1988 & Supp. IV 1992). The first version of § 924(c) was not included in the original gun control bill. Instead, it was offered as an amendment on the House floor by Representative Poff, and passed the same day it

⁶ 26 U.S.C. § 5801-5802; § 5811-5812; § 5821-5822; § 5841-49; § 5851-5854; § 5861; § 5871-72.

was introduced. 114 Cong. Rec. 22,231, 22,248 (1968). Consequently, legislative history is scarce. See *Simpson v. United States*, 435 U.S. 6, 13 (1978) (recognizing the scarcity of legislative history regarding § 924(c)).

Notwithstanding the limited legislative slate upon which § 924(c) was written, the few comments directed at § 924(c) are compatible only with the federal-specific construction that adheres to the plain meaning of its words. On the House floor Senator Mansfield commented: "[T]he bill provides for the first time a separate and additional penalty for the mere act of choosing to use or carry a gun in committing a crime under a federal law. . . ." 115 Cong. Rec. 34,838 (1968).

The efficacy of § 924(c) as a universal additional penalty for persons using firearms during the commission of federal crimes was somewhat curtailed by a series of cases in which this Court generally interpreted § 924(c) as a cumulative enhancement provision rather than a separate, additional offense. See *Simpson v. United States*, 435 U.S. 6 (1978) (federal judiciary could not apply § 924(c) to supply an additional enhancement absent clear Congressional directive); *Busic v. United States*, 446 U.S. 398 (1980) (federal sentence may not be increased under § 924(c) if defendant's sentence had already been enhanced under the underlying felony statute on account of a firearm). Therefore, under this Court's interpretation, the penalty provisions of § 924(c) were deemed to merge into any firearms enhancement provision attached to the predicate federal offense. Solely in response to this Court's holdings in *Simpson* and *Busic*, Congress acted to insure that § 924(c) applied even where an underlying federal offense included a firearm enhancement provision. The vehicle for this clarification was the Comprehensive Crime Control Act of 1984. See Pet. Brief at 22 (conceding the 1984 amendments to § 924(c) were intended to overturn the holdings in *Busic* and *Simpson*).

In addition to hundreds of federal crime changes, including the creation of the United States Sentencing Commission, the Comprehensive Crime Control Act of 1984 made several important changes to § 924(c). Perhaps most importantly, the section was amended to make the text plain that § 924(c) was

to be treated as a separate punishable offense regardless of the enhancement provisions of the underlying federal predicate offense. Comprehensive Crime Control Act of 1984. Continuing Appropriations, 1985 – Comprehensive Crime Control Act of 1984, Pub.L.No. 98-473, ch. 10 sec. 1005(a), § 924(c), 98 Stat. 1837, 2139-39 (1984). Therefore, the language of the amendment included new text that punishment for § 924(c) was to be "in addition to the punishment for (the predicate offense)" and that "a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon" may serve as a predicate for § 924(c). 18 U.S.C. § 924(c) (1988 & Supp. IV 1992). Consistent with the sentencing reforms of the Comprehensive Crime Control Act, the amended § 924(c) also eliminated the discretionary power of the federal sentencing judge and fixed punishment at five years for the first offense and ten years for the second. *Id.*

The next amendment to § 924(c) came with Part D of Chapter 10 of the Comprehensive Crime Control Act. Part D demonstrates that Congress only anticipated the application of a consecutive sentence for the commission of crimes under federal law. First, not to be ignored is the title to that chapter: "Mandatory Penalty for Use of a Firearm During a Federal Crime of Violence." Ch. 10, pt. D, 98 Stat. at 2138 (emphasis added). The significance of this title is emphasized by the Senate Judiciary Committee Report to Part D of Chapter 10. That Report makes manifest Congress' focus on the narrow issues addressed in *Busic* and *Simpson*, namely that § 924(c) should apply to all qualifying federal offenses, even if they include separate gun possession enhancements:

Part D of Title X is designed to impose a mandatory penalty without the possibility of probation or parole, for any person who uses or carries a firearm during and in relation to a *Federal crime of violence*. Although present Federal law, section 924(c) of Title 18, appears to set out a mandatory minimum sentencing scheme for the use or unlawful carrying of a firearm *during any Federal felony*, drafting problems and interpretations of the section in recent Supreme

Court decisions have greatly reduced its effectiveness as a deterrent to violent crime.

S.Rep. No. 98-225, 98th Cong., 2d Sess. 312, reprinted in 1984 U.S.C.C.A.N. 3182, 3490 (emphasis added).⁷ Viewed within the entire context of the Act, it is obvious that the focus of the changes enacted by Congress was simply to add the underlying federal offense – even if already enhanced – to those federal offenses for which additional punishment was required. The significance of the wholly federal focus of the Senate Report is revealed in the inclusion of identical language in the final bill. The 1984 changes were not intended in any way to impact the careful balance between State and Federal sovereignty. Nor was the intent to affect sentences for criminal acts for which the individual defendant had already received punishment. Indeed, neither subject was ever raised or addressed.

Section 924(c) was again amended in 1986 by the Firearms Owners' Protection Act. Pub.L.No. 99-308, section 104(a)(2)(A)-(E), 100 Stat. 449, 456 (1986). The most significant change to § 924(c) was to extend its reach to certain drug offenses. This was accomplished by adding the phrase "or drug trafficking crime" after "any crime of violence." *Id.* § 104(c), 100 Stat. 454. The 1986 amendment also added § 924(c)(2) which defined "drug trafficking crime" as "any felony violation of Federal law involving the distribution, manufacture, or

⁷ The Senate Report also contains a broad policy statement reflecting the intent of Congress that the 1984 amendments were to ensure that Section 924(c)'s enhancement provisions apply to federal crimes.

The Committee has concluded that subsection 924(c) should be completely revisited to ensure that all persons who commit Federal crimes of violence, including those crimes set forth in statutes which already provide for enhanced sentences for their commission with a dangerous weapon, receive a mandatory sentence, without the possibility of the sentence being made to run concurrently with that *for the underlying offense or for any other crime* and without the possibility of a probationary sentence or parole.

S. Rep. No. 98-225 at 313, 1984 U.S.C.C.A.N. at 3491 (emphasis added) (footnote omitted).

importation of any controlled substances (as defined in section 102 of the Controlled Substance Act (21 U.S.C. section 802))." *Id.* § 104(a), 100 Stat. 457. Since 1986, Congress has twice increased § 924(c)'s penalty provisions. The Anti-Drug Abuse Act of 1988, Pub.L.No. 100-690, § 646, 102 Stat. 4181, 4373-74; Crime Control Act of 1990, Pub.L.No. 101-647, § 1101, 104 Stat. 4789, 4829.

The statutory and legislative history fully confirms the plain meaning of § 924(c). Each of these changes was made solely in response to federal concerns regarding the use of firearms in connection with certain crimes. None was intended to change other features of federal sentencing law. Although Congress has progressively extended the reach and punishment of § 924(c) over the 28 years of its existence, there is no evidence to suggest that it mandated the dismantling of federal sentencing law or the principles of dual sovereignty.

The Tenth Circuit correctly recognized that Congress intended sentences under 18 U.S.C. § 924(c) to run *prior* to the service of any other sentence *imposed by the sentencing court*. The legislative history cited by the lower court demonstrates that the language "shall [not] run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried," was meant to apply to all terms of imprisonment handed down by the court imposing the sentence for the violation of § 924(c) – not to any other previously imposed terms of imprisonment. Not surprisingly, § 924(c) is similar to New Mexico's enhancement provisions for the use of a firearm for which the defendants in this case were already punished. N.M. Stat. Ann., § 31-18-16 (1978) provides that the penalty for use of a firearm is an additional one year sentence which "shall be the first year served and shall not be suspended or deferred."

Congress also intended that sentences for using or carrying a firearm in connection with a drug trafficking crime or crime of violence be served *prior* to the service of any other sentence imposed at the same time. The language of the Senate Report quoted by the lower court in its opinion is clear and unambiguous: "In addition, the Committee intends that the

mandatory sentence under the revised subsection 924(c) be served *prior* to the start of the sentence for the underlying or any other offense." *United States v. Gonzales*, 65 F.3d 814, 820 (10th Cir. 1995). The construction placed on § 924(c) by the Petitioner would result in the interests of both sovereigns being frustrated as it is not possible for both the sentences for the use of the firearm to be served "first" without being served concurrently.

Petitioner's legislative intent argument relies on the fiction of Congressional intent by omission. There is no evidence to support Petitioner's theory that Congress meant to extend § 924(c)'s enhancement provision to previously imposed sentences. Instead, the Government's legislative intent argument, inextricably intertwined with its plain meaning analysis, is constructed on the fiction that Congress' complete failure to mention States or State law in § 924(c) evidences a deliberate act. *See* Pet. Brief at 14, ("Congress could not have failed to understand that" § 924(c) would intertwine wholly with State prosecutions); *id.* at 15 ("Congress necessarily intended to preclude concurrence with any sentence imposed by the State authorities for related conduct."); *id.* at 16 (It was "Congress's intent to displace the legal authority that would authorize [a cross-sovereign concurrent] sentence").

Petitioner would have this Court accept and apply the novel proposition that, because Congress may be aware that States exist, by saying nothing, it explicitly meant to include State punishments among those covered under § 924(c). Put another way, the Petitioner's argument assumes that in 1984 Congress silently included States in the § 924(c) sentencing limitations because it knew that this Court, in 1996, would fully understand their unuttered intent and would therefore fill the gaps.

Petitioner's suggestion is twice removed from the reality of the text of § 924(c). When this Court is called upon to examine legislative history, it must employ secondary evidence which may not be accurate. *See, e.g., West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991) (Best evidence of legislative purpose is the text adopted by both Houses and

signed into law by the President). Not content with this problem alone, Petitioner would further have this Court find a legislative intent where there is silence by applying a presumption that Congress actually intended all the possible consequences of its actions. This request is based on three faulty assumptions: (1) Congress' understanding of the whole of law at a given point in time is accurate; (2) that body of law was primarily and consciously relevant to the legislative debate; and (3) Congress' actual understanding of the law is immutable and not subject to Court interpretation. This presumed intent by silence argument would, ultimately, strip this Court of its traditional and constitutional powers and would cede interpretive authority of legislative acts to the Executive.

II. THE UNITED STATES SENTENCING GUIDELINES RECONCILE § 924(c) WITH CONCEPTS OF DUAL SOVEREIGNTY WHILE INSURING THE UNIFORMITY AND FLEXIBILITY IN SENTENCING MANDATED BY CONGRESS.

At the direction of Congress, the Federal Sentencing Commission determined that sentences resulting from successive prosecutions by different sovereigns should run concurrently if they emanate from the same criminal activity. The same Act of Congress that mandated the creation of the Commission also included amendments to § 924(c) and the concurrent sentencing power of § 3485. *See* The Sentencing Reform Act of 1984, Title II of the Comprehensive Crime Control Act of 1984, 28 U.S.C. § 991 *et seq.* Thus, the provisions addressing cross-sovereign concurrent sentencing are part of an intricate design that addresses several, sometimes competing, interests. These provisions were designed to lead to "carefully considered determinations as to the appropriateness of concurrent, consecutive, or overlapping sentences in cases of multiple offenses." S.Rep. No. 225, 98th Cong., 2d Sess. 165 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3348. The Commission furnished the linchpin. The guidelines insure that the federal interest in a sentence is satisfied by sculpting sentences that appropriately reflect the seriousness of criminal activity. The Commission

also built in safeguards, protecting defendants from the danger that separate prosecutions for the same conduct would unfairly increase punishment. Finally, even in the multifarious arena of concurrent/consecutive sentencing, the guidelines induce uniformity while maintaining the flexibility necessary to individualize sentences. In cases of successive prosecutions by state and then federal authorities for the same criminal activity, concurrent sentences eliminate potential disparity; the departure provisions sustain flexibility.

A. The Guidelines Satisfy the Congressional Mandate to Address the Consecutive or Concurrent Sentence Dilemma in a Manner Consistent with the Overall Pattern of Criminal Sentencing Articulated in Title 18.

A scheme directing federal courts to order concurrent sentences in situations of successive state and federal prosecutions for the same activity reinforces Congressional policy to impose a sentence that reflects the seriousness of the offense in a manner respecting the goals of uniformity and individualized sentencing. Congress specifically directed the United States Sentencing Commission to address whether a sentencing court should order multiple sentences to run concurrently or consecutively. 28 U.S.C. § 994(a)(1)(D). Congress also required the guidelines to be consistent with the pertinent provisions of Title 18. 28 U.S.C. § 994(b)(1). The guidelines accomplish this task.

The guidelines anticipate and address the myriad of situations that confront sentencing courts within a framework that was intended to emphasize uniformity and just punishment and to respect the expertise of district courts, as well as the principle of dual sovereignty.⁸ Generally, courts sentencing on multiple counts of conviction have discretion to impose concurrent

⁸ Congress did not intend for the guidelines to operate in isolation. The Commission sought compatibility with existing law, both state and federal, concerning criminal sentencing. For example, Congress considered a guidelines design superior to mandatory sentencing provisions for

or consecutive terms. 18 U.S.C. § 3584.⁹ The guideline provisions complement this discretion. *See, e.g., United States v. Wills*, 881 F.2d 823, 825-27 (9th Cir. 1989) (discussing complementary nature of § 3584 and the guidelines in light of legislative history). The guidelines "say when, and to what extent, terms should be concurrent or consecutive." *United States v. Flowers*, 995 F.2d 315, 317 (1st Cir. 1993). If a

attaining "consistent and rational" sentencing policy. U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 20, n.64 (1991) (citing S. Rep. No. 225, 98th Cong., 2d Sess. 39, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3358). Nevertheless, Congress attempted to harmonize mandatory sentencing provisions with a guidelines structure. *See, e.g., U.S.S.G. §§ 2K2.4(a) & 5G1.1.*

⁹ § 3584. Multiple sentences of imprisonment

(a) Imposition of concurrent or consecutive terms. — If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

(b) Factors to be considered in imposing concurrent or consecutive terms. — The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

(c) Treatment of multiple sentence as an aggregate. — Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

particular guideline provision does not specifically contemplate discretion, courts retain the authority to depart. 18 U.S.C. § 3553(b); U.S.S.G., Ch. 1, Pt. A, intro. at 4(b), and § 5K2.0. Thus, the guidelines limit, but do not supersede, the sentencing court's discretion. The federal courts of appeal have adopted this approach. See *United States v. Flowers*, 995 F.2d 315, 316-17 (1st Cir. 1993); *United States v. Rogers*, 897 F.2d 134, 136-37 (4th Cir. 1990); *United States v. Miller*, 903 F.2d 341, 349 (5th Cir. 1990); *United States v. Stewart*, 917 F.2d 970, 972-73 (6th Cir. 1990); *United States v. Shewmaker*, 936 F.2d 1124, 1127-28 (10th Cir. 1991); *United States v. Fosset*, 881 F.2d 976, 980 (11th Cir. 1989); but see, *United States v. Nottingham*, 898 F.2d 390, 393-95 (3d Cir. 1990). An intricate web of directives, coupled with the ability to depart,¹⁰ insures that a sentencing judge will address Congress' intent to impose a just sentence and promote respect for the law, including concepts of dual sovereignty. See 18 U.S.C. § 3553(a)(2)(A).

B. Section 5G1.3(b) Reflects the Commission's Intent to Respect Notions of Dual Sovereignty Inherent in Cross-Sovereign Convictions.

Concurrent sentences in successive state and federal prosecutions for the same conduct preserve the integrity of the courts of both sovereigns and safeguard defendants from unfair sentences. In this case, concurrent sentences best address the interests of both New Mexico and the United States. The New Mexico courts fashioned an appropriate sentence to punish respondents for their criminal activity. The federal courts did the same. Only by running the state and federal sentences concurrently is the integrity of both sovereigns maintained.

Likewise, concurrent sentences protect defendants from inappropriately severe periods of incarceration. Section 5G1.3(b) acts as a safeguard, "protect[ing] . . . against having the length of [defendants'] sentence multiplied by duplicative

¹⁰ Courts maintain general authority to depart. 18 U.S.C. § 3553(b). The guidelines anticipate that courts may use their departure power in § 924(c) cases. See U.S.S.G. § 2K2.4 (Commentary).

consideration of the same criminal conduct. . . ." *United States v. Witte*, ___ U.S. ___, 115 S. Ct. 2199, 2209 (1995). This safeguard is critical today, when public fear of drugs and violence pushes many courts to the brink of overreaction. And, it is essential to a design that strives towards uniformity in sentencing.¹¹

C. Mandating Consecutive Sentences in Cases Involving Successive State and Federal Convictions Would Result in Unwarranted Disparity.

In the great majority of situations, as in this case, concurrent sentences better further the goals of just punishment and uniformity. Congress demanded, received, and passed sentencing guidelines that imposed punishment based primarily on the offense committed and the criminal history of the offender.¹² This vision is contrary to the position urged by the Solicitor General, namely, that this single sequence of events should result in punishment that accumulates both the state and federal sentences.¹³ Punishment depends not on the defendants' culpability or criminal history, but rather on the prosecutor's decision to charge the defendants in a federal forum. This posture offends the spirit of the guidelines as well as the wisdom of this Court regarding just sentences. See *United*

¹¹ The departure provisions secure the federal interest. A district court could always depart upward despite 5G1.3(b). Appellate review of the departure safeguards the defendant in this circumstance. Additionally, because departures must be justified, they are the "discretion of choice." The guidelines structure envisions a common law evolving from district courts' explanations of their departures. U.S.S.G. Ch. 1, Pt. A, at 6.

¹² Even in situations involving ancillary jurisdiction over one or more multiple offenses committed during the same course of conduct, Congress directed the Commission to adopt a scheme of incremental rather than cumulative punishment. 28 U.S.C. § 994(l)(1)(A).

¹³ This position ignores the reality that concurrent sentences fully satisfy the federal interest because the absolute punishment reflects the totality of respondents' criminal conduct that was the subject of their federal convictions.

States v. Witte, ___ U.S. ___, 115 S.Ct. 2199, 2208-09 (1995) ("§ 5G1.3 operates to mitigate the possibility that the fortuity of two separate prosecutions will grossly increase a defendant's sentence. . . .")¹⁴ Uniformity, too, will be compromised by the government's position.

Concurrent sentences in cases of successive state-federal prosecutions for a single sequence of events can better assure uniform sentences among offenders from differing jurisdictions without compromising the sovereignty of the states. Uniformity in sentencing is a fundamental goal of our criminal justice

¹⁴ Although arguably appropriate in situations involving only federal jurisdiction, the use of section 924(c) as a bargaining instrument is not appropriate in cases where dual sovereignty is implicated. Generally, the structure of mandatory minimum sentences endows prosecutors with substantial discretion. U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 32 (1991). This discretion "shift[s] . . . control over the implementation of sentencing policies from courts to prosecutors." *Id.*; see also Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L.REV. 61, 94-5 (1993) (describing how prosecutors use § 924(c) as a "powerful bargaining chip to convince defendants to plead guilty"). Initial empirical data suggests that mandatory minimums like § 924(c) breed unwarranted disparity in sentencing, including disparity based on race and other unlawful factors. U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 89 (1991). Anecdotal data suggests that mandatory sentences may actually discourage plea bargains in some situations. *Id.* at 101. While many of the effects of mandatory minimums may further goals of sentencing, this Court must continue to monitor the discretion that charged-based mandatory sentences confer on federal prosecutors. Cases that implicate dual sovereignty are particularly vulnerable to impermissible use of this discretion. The Solicitor General would have this Court endorse a sentencing scheme that would allow federal prosecutors excessive and undue leverage during plea negotiations regarding state charges. If § 924(c) sentences were imposed consecutive to those assessed by state courts, federal prosecutors could multiply defendants' liability. The result, in addition to unwarranted disparity and inappropriately harsh sentences, would be an impermissible imposition on a state's sovereign power to fashion an appropriate criminal sentence.

system. The sentencing guidelines represent the most concerted effort towards consistency in punishment. Fundamental to the notion of sovereignty is the right of a state to fashion criminal punishment. State sentences for similar criminal activity will vary. A federal sentence imposed consecutively will increase, not eliminate, disparity.

III. PRINCIPLES OF DUAL SOVEREIGNTY AND DUE PROCESS REQUIRE THAT SENTENCES FOR VIOLATIONS OF § 924(c) MAY NOT RUN CONSECUTIVELY TO A TERM OF IMPRISONMENT IMPOSED BY A STATE COURT BASED UPON THE SAME CONDUCT UNDERLYING THE VIOLATION OF § 924(c).

Each of the several States shares with the federal government a concurrent sovereignty. "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The power of each sovereign, however, is not entirely discrete and separate. Indeed, it is the very *concurrency* of power which acts in this Constitutional Union as the mechanism which insures a check on governmental abuses of either sovereign. *Id.* at 458.¹⁵

In this sympathetic system of dual sovereignty, the federal government is given a constitutional advantage in this balance *vis-à-vis* the Supremacy Clause. U.S. Const., Art. VI cl. 2. However, this clause does not destroy the independent sovereignty of the States. Further, it "is a power [the Court] must assume Congress does not exercise lightly." *Gregory*, 501 U.S.

¹⁵ See also *The Federalist Papers*, No. XXVIII:

Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.

Petitioner in this case is one of these rival powers and Respondent and *Amicus* are cast in the role of advocating the States' interest in checking that power.

at 460. The delicate balance occasioned by the constitutional mechanism of dual sovereignty depends on this Court presuming no favor to the federal government. This restraint is particularly necessary in circumstances in which the sovereign power, although concurrent, resides primarily with the States.

A. This Court Must Maintain the Delicate Balance of Power Between the State and Federal Sovereigns Regarding Criminal Justice.

Petitioner concedes in its brief that "the punishment of crimes is primarily the province of the States." Pet. Brief at 8, *see also id.* at 14 (*quoting Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)) ("States possess primary authority for defining and enforcing criminal law.") In our concurrent system of sovereignty, the States' primacy of interest in criminal justice helps insure that citizens feel close allegiance to the State. Such allegiance is created by just implementation of the laws, both public and private, to the disputes of each State's citizens. Such allegiance assures States remain viable and credible sovereigns in our concurrent powers system.

There is one transcendent advantage belonging to the province of the State governments, . . . I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment.

The Federalist Papers, No. XVII. For the federal sovereign to appropriate this power in a haphazard fashion would upset this "most attractive source of popular obedience." This elementary mandate of separate sovereignty in our constitutional system is fully ignored in the argument presented by Petitioner to this Court.

Amicus does not dispute the power of the federal courts to prosecute this crime separately. *See Abbate v. United States*,

359 U.S. 187 (1959).¹⁶ What *Amicus* does dispute is the Petitioner's unsupported assumption that Congress has mandated consecutive Federal punishments predicated on State punishments for same-transaction crimes.

B. New Mexico's Interest in Fashioning an Appropriate Sentence would be Marginalized by a Federally Mandated Consecutive Sentence.

The single most important *fact* in this case is that the criminal transaction for which the Respondent and others were prosecuted was State planned, State initiated, and State executed. The officers involved were State officers and, when their reverse sting turned sour, it was State officers posing as drug dealers who were victimized. No federal agency was involved in the planning of the reverse sting and no federal agent was at risk during the implementation of the plan. Further, the State expressed its primary interest in the criminal transaction by prosecuting and sentencing those involved, including adding an enhancement for the use of a weapon during the criminal activity. Moreover, no federal agent was an important witness at the later federal trial.

The Petitioner, in its brief, assiduously avoids mention of the State's interest in the sentence that should be imposed in this case. As indicated above, each of the Respondents was first tried, convicted and sentenced in State court for their crimes against the State of New Mexico. New Mexico vests the authority to impose concurrent sentences in the trial court.

In the situation presented to this Court, New Mexico, at the time of sentencing, had before it no other sentence to consider. This, however, does not mean that the sentencing

¹⁶ Contrary to the Petitioner's assertion that *Abbate* stands for the proposition that the Federal Government may "punish the offender cumulatively," Pet. Brief at 14, the case in fact stands only for the well settled principle that the Federal Government may *prosecute* cumulatively. *Abbate*, 359 U.S. at 196; *see also Bartkus v. Illinois*, 359 U.S. 121 (1959) (successive State prosecution after federal prosecution does not violate the Constitution).

interest and authority was therefore abandoned to the Federal Government if it chose to prosecute same-transaction offenses. In such situations, where no preference is stated by the sentencing judge, New Mexico common law has long mandated that when there are two or more sentences based on separate convictions – regardless of whether they are for same transaction offenses – the sentences are to be run concurrently. *See Swope v. Cooksie*, 285 P.2d 793 (N.M. 1955).¹⁷

This specific determination of a concurrent sovereign regarding the appropriate sentence for a given transaction should not be allowed to be easily upset by Congress. And, it is not just the law of New Mexico which would be so overwritten. The law of each of the fifty states either mandates concurrence in same-transaction sentencing,¹⁸ defaults concurrence in same-transaction sentencing¹⁹ or, at a minimum, allows the State trial court the discretion to require concurrent sentences in same-transaction sentencing.²⁰ There therefore

¹⁷ *See also State v. Maybury*, 643 P.2d 629, 632 (N.M.App. 1982): "The trial court has discretion to require sentences to be served consecutively, but if this is not done, and there is no legislation covering the situation, the sentences are to be run concurrently." (Citations omitted).

¹⁸ *See* South Dakota Codified Laws 22-6-6.1 (1996); *State v. Red Kettle*, 452 N.W.2d 774 (S.D. 1990) (State court has no authority to order state sentence to run consecutively to same-transaction federal sentence).

¹⁹ *See* Ark. Code Ann. § 5-4-403(b) (Michie 1995); Cal. Penal Code § 669 (West 1996); Fla. Stat. Ann. § 921.16(1)(2) (West 1995); Ga. Code Ann. § 17-10-10(b) (Harrison 1996); 730 Ill. Comp. Stat. 5/5-8-4 (West 1996); Me. Rev. Stat. Ann. tit. 17A, § 1256(2) (West 1995); Minn. Stat. § 609.15 (1995); Mo. Rev. Stat. § 558.026(3) (1995); Sup. Ct. R. 2909, Rev. Stat. Mo. (1996); N.Y. Penal Law § 70.25(2) (McKinney 1996); N.D. Crim Code 12.1-32-11 (1995); Ohio Rev. Code Ann. § 2929.41 (Baldwin 1996); Or. Rev. Stat. § 137.370 (1995); Pa. Stat. Ann. tit. 42, § 9721 (West 1995), 204 Pa. Code § 303.7(a) (1995) (Sentencing guidelines for current multiple convictions); Vt. Stat. Ann. tit. 13, § 7032 (1995) (implied, *See, In re Hough*, 458 A.2d 1134 (1983); Wash. Rev. Code Ann. § 9.94A.400 (West 1996).

²⁰ *See*, Ala. Rules Crim. Pro., Rule 26.12 (1996); Colo. Rev. Stat. § 18-1-408(3) (1995); Conn. Gen. Stat. § 539-37 (1994); Del. Code Ann.

exists a near-universal determination that same-transaction concurrence in sentencing is an essential interest of the sentencing authority.²¹

tit. 11, § 1447 (1995); Haw. Rev. Stat. § 706-668.5(1) (Michie 1995); Idaho Code § 18-308 (1996); Ind. Code § 35-50-1-2(c) (1996); Iowa Code § 901.5 (1995); Kan. Stat. Ann. § 21-4608(h) (1995); Ky. Rev. Stat. Ann. § 532.110(1) (Banks-Baldwin 1995); La. Code Crim. Proc. Ann. art. 883 (West 1996); Md. Code 1957, Art. 27, § 486 (1995); Mass. Gen. Laws Ann. ch. 279 § 8 (West 1996); M.C.L.A. 768.7b; Miss. Code Ann. § 99-19-21(1) (1995); Mont. Code Ann. § 46-18-401 (1995) (*construed in State v. Miller*, 757 P.2d 1275 (Mont. 1988)); Mo. Ann. Stat. § 558.026 (Vernon 1995); Neb. Rev. Stat. § 29-2204 (1995); *State v. Zaritz*, 235 Neb. 599 (Neb., 1990); N.J. Stat. Ann. § 2C: 44-5(D) (West 1995); N.C. Gen. Stat. § 15-196.2 (1995) (*implied*); Okla. Stat. tit. 21 § 61.1 (1995); Okla. Stat. tit. 22 § 976 (1995); R.I. Code R., Super. Ct. Sent. Benchmark 7 (1994); S.C. Code Ann. § 44-53-370 (1976); Tex. Code Ann. § 40-20-111(a) (1996); Tex. Code Crim. Proc. Ann. art. 42.08 (West 1995); Utah Code § 76-3-401 (1996); Va. Code Ann. § 19.2-308 (1996); W. Va. Code § 61-11-21 (1995); Wis. Stat. § 973.15 (1996); W. R. Cr. P., Rule 35 (1995).

A small minority of States seem to presume consecutive sentencing, but allow state court discretion to run same-transaction crimes concurrently. *See* Alaska Stat. § 12.55.025 (1995); Ariz. Rules Crim. Pro., Rule 26.13 (West 1996); D.C. Code Ann. § 23-112 (1996); Nev. Rev. Stat. § 176.045 (1995).

²¹ The American Bar Association's Standards for Criminal Justice Sentencing, third ed., likewise support the principle of same-transaction (or single episode) sentencing concurrence in Standard 18-6.5, which reads: In sentencing an offender for offenses that were part of an episode;

- (i) a sentencing court should not increase the severity of the sentence or change the type of sanction merely as a result of the number of counts or charges made from a single episode, and
- (ii) where the separate offenses are not merged for sentencing, a sentencing court should consider imposition of sanctions of a type and level of severity that take into account the connections between the separate offenses and, in imposing sanctions of total confinement, ordinarily should designate them to be served consecutively.

See also Standard 18-3.8(b) ("A sentencing court should be authorized to impose a sanction of total confinement to run concurrently with an out-of-

C. Due Process and Fundamental Fairness Prevent the Federal Sovereign from Consecutive Punishments for Conduct already Punished by the State.

Although this Court has often visited the issue whether each sovereign may successively *prosecute* for same-transaction offenses, it has never addressed the issue whether each sovereign may *consecutively punish* for same-transaction offenses. *Amicus* urges this Court to use this occasion to finally hold that the federal sovereign may not order a same-transaction punishment to run consecutively to that ordered by a State. This result is dictated by precedent and fairness, and should be held to be a part of due process required by both the Fifth and Fourteenth Amendments to the United States Constitution.

The history of this Court's concern with the due process and fundamental fairness implications of cross-sovereign punishment is longstanding indeed. In *Fox v. Ohio*, 5 How. 410, 435 (1847), this Court stated:

It is almost certain, that, in the benignant spirit in which the institutions both of the state and federal systems are administered, *an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same*, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor.

(*Emphasis added*). See also *Rinaldi v. United States*, 434 U.S. 22, 27-28 (1977) (quoting *Fox*); *United States v. Lanza*, 260 U.S. 377, 383 (1922) (same).

This distinction between the constitutionality of successive prosecutions and the constitutionality of consecutive punishments is critical to the instant case. The reason for a different holding regarding prosecutions and punishments is described in *Abbate*, namely, that each sovereign should be able to independently determine and impose the sentence that

state sentence, even though the time will be served in an out-of-state institution.").

each believes appropriate. In *Abbate*, the Court was faced with an ideal example of this principle:

For example, the petitioners in this case insist that their Illinois convictions resulting in three months' prison sentences should bar this federal prosecution which could result in a sentence of up to five years. Such a disparity will very often arise when, as in this case, the defendants acts impinge more seriously on a federal interest than on a State interest.

Id. at 195. Therefore, the basis of the Court's ruling has been that "if the Double Jeopardy Clause were applied when the sovereign with the greater interest is not the first to proceed, the administration of criminal justice may suffer." *Rinaldi*, 434 U.S. at 28.

In light of the very real eventuality of different sovereign interests, be it in favor of the State or the federal government, this Court has not barred successive cross-sovereign prosecutions for same-transaction offenses. Nothing in this analysis, however, suggests that either sovereign has an interest in consecutive sentences for those offenses. To suggest otherwise, as Petitioner does without any analysis, extends the limited idea of concurrent sovereignty to mean that each sovereign is entitled, independently, to its own distinct punishment. Nothing in history, law, or practice supports this idea.

Incarceration as punishment is no different if that term is served in State prison in Los Lunas, New Mexico, or the federal penitentiary in Leavenworth, Kansas. As detailed above, the fifty States have recognized the appropriateness of same-transaction concurrent sentencing. The federal government has, through legislation, recognized the propriety of same-transaction concurrence in sentencing. Further, the Petitioner has previously recognized that the interests in concurrence of sentences in same-transaction crimes – or indeed of no successive prosecution at all – may be mandated by the problems of unfairness inherent in the dual sovereignty system of successive prosecutions. In 1960, only a year after its reconsideration of the limitations on dual sovereignty in *Abbate*

and *Bartkus*,²² this Court recognized the Attorney General's right to dismiss an indictment in federal court to avoid any perceived unfairness of sentences. *Petite v. United States*, 361 U.S. 529 (1960) (*per curiam*). In light of the Solicitor General's motion to vacate the indictment below, this Court was left with no controversy to resolve. *Id.* However, the Solicitor General declared that dismissing a federal indictment arising from the same event which had already been prosecuted and punished in State court, was an action "dictated by considerations both of fairness to the defendants and to efficient and orderly law enforcement." *Id.* at 530.

This policy of exercising federal executive discretion to forego prosecution of one already convicted in a State prosecution of same-transaction crimes, is now an Executive policy referred to as the *Petite* policy for the name of the case in which it was first discussed. See Department of Justice Manual 9-2.142.²³ Because this policy of restraint is not presently constitutionally commanded, the application of the policy still rests with the federal executive. However, this Court has recognized that the interests implicated by such cross-sovereign

²² This Court has specifically noted that the *Petite* policy "was formulated by the Justice Department in direct response to this Court's opinions in *Bartkus* . . . and *Abbate* . . ." *Rinaldi v. United States*, 434 U.S. 26, 18 (1977). In fact, the Attorney General's announcement of the policy on April 6, 1959, came only one week after *Bartkus* and *Abbate* were decided and two months before rehearing was denied in *Bartkus*. (No rehearing was sought in *Abbate*).

²³ One of the stated purposes of the Executive's *Petite* policy of foregoing successive prosecutions to State prosecutions and convictions is:

to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s).

Department of Justice Manual 9-2.142(I)(B). The procedure for implementing this policy is designed to ensure the actual exercise of discretion by high level prosecuting officials by requiring prior approval for prosecution. *Id.* at (V)(B.) If such prior approval is not obtained, the United States is to dismiss the charges unless the Assistant Attorney General retroactively approves the prosecution. *Id.*, at (V)(C.)

prosecutions are significant enough to allow defendants caught between two same-transaction prosecutions to claim a violation of the policy in federal court. See *Rinaldi v. United States*, 434 U.S. 22 (1977).²⁴ In its *per curiam* opinion in *Rinaldi*, this Court noted that the *Petite* policy was the Executive's response to the concerns of the Court regarding the legitimacy of successive state and federal prosecutions for the same-transaction. This Court noted that "this Executive policy serves to protect interests which, but for the 'dual sovereignty' principle inherent in our federal system, would be embraced by the double jeopardy clause." *Id.* at 29.

The *Petite* policy is essentially a concurrent sentencing policy with two separate components. If the Executive is satisfied that the punishment received in the State court is sufficient to vindicate the separate interests of the federal sovereign, it will forego further proceedings for both prosecution and punishment reasons. As to the independent prosecution aspect of the *Petite* policy, the rule is merely the expression of a determination of available resources for the Executive. As to the independent punishment feature of the policy, concurrent sentencing is mandated by due process concepts of fundamental fairness. In circumstances like the instant case, the independent federal sovereign's interest in absolute punishment is completely satisfied by the State of New Mexico's same-transaction sentences and, therefore, regardless of the Executive's resource determinations regarding prosecution, cross-sovereign consecutive punishment is fundamentally unfair.

Therefore, to insure the appropriate use of the *Petite* policy, it should be mandated under the Fourteenth Amendment due process clause that, in same-transaction, dual sovereign criminal prosecutions, neither sovereign power has an interest in consecutive sentencing. The only constitutionally acceptable expression of a sovereign's interest in punishment for a crime is in the absolute sentence imposed – without regard to another sovereign's similar or disparate pronouncements.

²⁴ An argument that the *Petite* policy should be implemented was raised below in the District Court. See Joint Appendix at 36-37.

CONCLUSION

Thorough analysis of the question raised in this case requires a holding that § 924(c) does not mandate, or even allow, consecutive sentencing for a defendant who is subject to imprisonment under state sentence based upon the same transaction leading to the conviction for a violation of § 924(c). This holding is supported by the plain meaning of the statute, within the context of federal criminal law. In addition, the legislative history of the Act confirms this reading. Such a holding is also required by the Constitutional limits of the dual sovereignty doctrine and the Due Process Clause of the Fifth Amendment to the Constitution. The results so demanded by this analysis protect both state and federal interests in punishment for criminal activity.

Respectfully submitted,

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APPENDIX

a1

SECOND JUDICIAL DISTRICT COURT

COUNTY OF BERNALILLO

STATE OF NEW MEXICO

No. CRCR 91-0770

DA#: 91-1093-01

STATE OF NEW MEXICO

Plaintiff,

vs.

MIGUEL GONZALES,

DOB: 2-18-61

SSN: 589-38-9962

ADD: BCDC

Defendant.

JUDGMENT, PARTIALLY SUSPENDED SENTENCE
AND COMMITMENT

(Filed March 24, 1992)

On March 10, 1992, this case came before the Honorable W. C. Woody Smith, District Judge, for sentencing, the State appearing by Neil Candelaria, Deputy District Attorney, the Defendant appearing personally and by his attorney Lauro Silva, and the Defendant having been convicted on February 11, 1992, pursuant to a jury verdict of guilty, accepted and recorded by the Court, of the offenses of: Armed Robbery (Firearm Enhancement), a felony offense occurring on or about April 23, 1991, as contained in Count 2 of the Indictment; Attempt to Commit a Felony, to wit: Armed Robbery of Marijuana (Firearm Enhancement), a felony offense occurring on or about April 23, 1991, as contained in Count 3 of the

Indictment; Conspiracy to Commit Armed Robbery (Firearm Enhancement), a felony offense occurring on or about April 23, 1991, as contained in Count 4 of the Indictment and Conspiracy to Commit Possession of Marijuana (eight ounces or more) a felony offense occurring on or about April 23, 1991, as contained in Count 6 of the Indictment as amended at trial.

The Defendant is hereby found and adjudged guilty and convicted of said crimes, and is sentenced to the custody of the Corrections Department to be imprisoned for the term of: nine (9) years as to Armed Robbery; three (3) years as to Attempt to Commit a Felony to wit: Armed Robbery of Marijuana; three (3) years as to Conspiracy to Commit Armed Robbery, and one and one half (1½) years as to Conspiracy to Commit Possession of Marijuana (eight ounces or more). All sentences are to run *consecutive* to one another. In addition, all the offenses, excluding Conspiracy to Commit Possession of Marijuana (Count 6) are *each* enhanced by 1 year pursuant to Section 31-18-16 NMSA, 1978, for a total sentence of nineteen and one half (19½) years. Six and one half (6½) years is suspended, for an actual sentence of imprisonment of thirteen (13) years.

Execution of six and one half (6½) of the sentence is suspended and Defendant is ordered to be placed on supervised probation for five (5) years following release from custody, on condition that Defendant obey all rules, regulations and orders of the Probation Authorities, and observe all federal, state and city laws or ordinances.

THEREFORE, You, the Corrections Department of the State of New Mexico are hereby commanded to take the

above-named Defendant in custody and confine him for the above term.

Defendant is to receive credit for 322 days pre-sentence confinement and for post-sentence confinement until delivery to the place of incarceration.

IT IS FURTHER ORDERED that Defendant be placed on parole for 2 years after release, and be required to pay parole costs.

/s/ W.C. Woody Smith
DISTRICT JUDGE

APPROVED:

/s/ Illegible
Deputy District Attorney

/s/ Illegible
Attorney for Defendant

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

No. CR-CR-91-0776
DA#: 91-1093-03

STATE OF NEW MEXICO

Plaintiff,

vs.

MARIO PEREZ,
DOB: 3-21-65
SSN: 597-44-9801
ADD: BCDC

Defendant.

FIRST AMENDED
JUDGMENT, PARTIALLY SUSPENDED SENTENCE
AND COMMITMENT

(Filed April 23, 1992)

On March 10, 1992, this case came before the Honorable W. C. "Woody" Smith, District Judge, for reconsideration of sentence filed by the Defendant. The State appeared by Neil Candelaria, Deputy District Attorney, the Defendant appeared personally and by his attorney Becky S. Jiron. The Court having reconsidered its sentence entered in the above matter on March 24, 1992, for the following offenses: Armed Robbery (Firearm Enhancement) a felony offense occurring on or about April 23, 1991, as contained in Count 1 of the Indictment; Armed Robbery (Firearm Enhancement) a felony offense occurring on or about April 23, 1991, as contained in Count 2 of the Indictment; Armed Robbery of Marijuana

(Firearm Enhancement) as contained in Count 3 of the Indictment; Conspiracy to Commit Armed Robbery (Firearm Enhancement) a felony offense occurring on or about April 23, 1991, as contained in Count 4 of the Indictment; False Imprisonment (Firearm Enhancement) a felony offense occurring on or about April 23, 1991, as contained in Count 5 of the Indictment; Conspiracy to Commit Possession of Marijuana (eight ounces or more) a felony offense occurring on or about April 23, 1991, as contained in Count 6 of the Indictment as amended in trial, and Eluding an Officer, a misdemeanor offense occurring on or about April 23, 1991, as contained in Count 7 of the Indictment as amended at trial.

The Defendant is hereby found and adjudged guilty and convicted of said crimes, and is sentenced to the custody of the Corrections Department to be imprisoned for the term of nine (9) years as to *each* Armed Robbery; three (3) years as to Attempt to Commit a Felony to wit: Armed Robbery of Marijuana; three (3) years as to Conspiracy to Commit Armed Robbery; one and one-half (1½) years as to Conspiracy to Commit Possession of Marijuana) one and one-half (1½) years as to False Imprisonment; and three-hundred sixty-four (364) days as to Eluding an Officer. All sentences are to run *consecutive* to one another. In addition, all the offenses, excluding Conspiracy to Commit Possession of Marijuana and Eluding an Officer, are *each* enhanced by 1 year pursuant to Section 31-18-16 NMSA, 1978 for a total sentence of thirty-two (32) years and three hundred and sixty-four days of which fifteen (15) years and three hundred and sixty-four days are suspended for an actual sentence of 17 years. Defendant is ordered to be placed on supervised

probation for five (5) years following release from custody, on condition that Defendant obey all rules, regulations and orders of the Probation Authorities, and observe all federal, state and city laws or ordinances.

THEREFORE, You, the Corrections Department of the State of New Mexico are hereby commanded to take the above-named Defendant in custody and confine him for the above term.

Defendant is to receive credit for 314 days pre-sentence confinement and for post-sentence confinement until delivery to the place of incarceration.

IT IS THEREFORE ORDERED that Defendant be placed on parole for 2 years after release, and be required to pay parole costs.

/s/ W.C. Woody Smith
DISTRICT JUDGE

APPROVED:

/s/ Illegible
Deputy District Attorney

/s/ Becky S. Jiron
Attorney for Defendant

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

No. CRCR 91-0772

DA#: 91-1093-03

STATE OF NEW MEXICO

Plaintiff,

vs.

ORLENIS HERNANDEZ-DIAZ,

DOB: 12-16-65

SSN: 592-96-8181

ADD: BCDC

Defendant.

FIRST AMENDED
JUDGMENT, PARTIALLY SUSPENDED SENTENCE
AND COMMITMENT

(Filed Apr. 23, 1992)

On March 10, 1992, this case came before the Honorable W. C. "Woddy" Smith, District Judge, for reconsideration of sentence filed by the Defendant. The State appeared by Neil Candelaria, Deputy District Attorney, the Defendant appeared personally and by his attorney Phillip Medrano. The Court having reconsidered its sentence entered in the above matter on March 24, 1992, for the following offenses: Armed Robbery (Firearm Enhancement) a felony offense occurring on or about April 23, 1991, as contained in Count 1 of the Indictment; Attempt to Commit a Felony to wit: Armed Robbery of Marijuana (Firearm Enhancement), a felony offense occurring on or about April 23, 1991, as contained in

Count 3 of the Indictment; Conspiracy to Commit Armed Robbery (Firearm Enhancement) a felony offense occurring on or about April 23, 1991, as contained in Count 4 of the Indictment; False Imprisonment (Firearm Enhancement) a felony offense occurring on or about April 23, 1991, as contained in Count 5 of the Indictment, and Conspiracy to Commit Possession of Marijuana (eight ounces or more) a felony offense occurring on or about April 23, 1991, as contained in Count 6 of the Indictment as amended at trial.

The Defendant is hereby found and adjudged guilty and convicted of said crimes, and is sentenced to the custody of the Corrections Department to be imprisoned for the term of: nine (9) years as to Armed Robbery; three (3) years as to Attempt to Commit a Felony to wit: Armed Robbery of Marijuana; three (3) years as to Conspiracy to Commit Armed Robbery; one and one half (1½) years as to Conspiracy to Commit Possession of Marijuana (eight ounces or more). All sentences are to run *consecutive* to one another. In addition, all the offenses, excluding Conspiracy to Commit Possession of Marijuana (Count 6) are *each* enhanced by 1 year pursuant to Section 31-18-16 NMSA, 1978, for a total sentence of twenty-two (22) years, of which seven and one-half (7½) years is suspended, for an actual sentence of imprisonment of fourteen and one-half (14½) years.

Execution of seven and one-half (7½) years of the sentence is suspended and Defendant is ordered to be placed on supervised probation for five (5) years following release from custody, on condition that Defendant obey all rules, regulations and orders of the Probation

Authorities, and observe all federal, state, and city laws or ordinances.

THEREFORE, You, the Corrections Department of the State of New Mexico are hereby commanded to take the above-named Defendant in custody and confine him for the above term.

Defendant is to receive credit for 322 days pre-sentence confinement and for post-sentence confinement until delivery to the place of incarceration.

IT IS FURTHER ORDERED that Defendant be placed on parole for 2 years after release, and be required to pay parole costs.

W.C. WOODY SMITH
DISTRICT JUDGE

APPROVED:

Deputy District Attorney

/s/ Phillip Medrano

Attorney for Defendant
